IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FRONTIER COMMUNICATIONS SERVICES INC., a Michigan corporation,	)	
Plaintiff,	)	
	)	No. 98 C 7475
v.	)	
	)	Magistrate Judge Schenkier
CRYSTAL MANAGEMENT ASSOCIATES, L.L.C., an Illinois Limited Liability company, d/b/a/ CRYSTAL MANAGEMENT ASSOCIATES, INC. n/k/a TELECOM HOLDINGS, INC., an Illinois corporation, and EQUINOX SYSTEMS CORPORATION, an Illinois Corporation,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Frontier Communications Services, Inc. ("Frontier") has brought this diversity action, alleging breach of contract. The only remaining defendant is Crystal Management Associates, L.L.C., d/b/a Crystal Management Associates, Inc., n/k/a Telecom Holdings, Inc. ("Crystal"); Equinox Systems Corporation ("Equinox") was originally joined as a defendant, but pursuant to a settlement, was dismissed with prejudice on January 6, 2000. Frontier claims that on August 11, 1997, Crystal signed Dedicated Service Order No. 4510, contracting with Frontier for a one-year Optional International Clear Value Monthly Usage service, with a minimum usage level of $20,000 per month (Compl. ¶ 6). Frontier claims that it agreed to provide network transport and other telecommunications to Crystal for resale to business and residential customers, and that Crystal agreed to pay Frontier for those services (Compl. ¶ 7). Frontier seeks recovery of $122,613.26, in payment for services Frontier claims it provided but for which

Crystal has not paid. For its part, Crystal admits the Dedicated Service Order No. 4510 exists, but denies that this document constitutes either a contract or an agreement between plaintiff and defendant.

Presently before the Court is Frontier's motion for summary judgment [doc. #45-1]. For the reasons set forth below, Frontier's motion is granted.

I.

Summary judgment is proper if the record shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See Lexington Ins. Co. v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1090 (7th Cir. 1999). A genuine issue for trial exists only when the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *See Liberty Lobby*, 477 U.S. at 249-50; *Flipside Prods., Inc. v. Jam Prods. Ltd.*, 843 F.2d 1024, 1032 (7th Cir. 1988).

Frontier has complied with Local Rule 56.1(a) which requires a party moving for summary judgment to file a statement of material facts as to which the moving party contends there is no genuine issue. As required, Frontier's statement of material, undisputed facts included "references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph." UNITED STATES DIST. COURT, N. DIST. OF ILL. LR 56.1.

All properly supported material facts set forth in a summary judgment motion are deemed admitted unless properly controverted by the opposing party. *See id.*; *see also Corder v. Lucent Techs., Inc.*, 162 F.3d 924, 927 (7th Cir. 1998); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 453 (7th Cir. 1994); *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 921-22 (7th Cir. 1994). Thus, once Frontier

moved for summary judgment, and supported its factual assertions with evidentiary materials, Crystal could not merely rely on its denial in the pleadings to show that a genuine issue of material fact existed. *See Shermer v. Illinois Dep't of Transp.*, 171 F.3d 475, 477 (7th Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Rather, Crystal was obliged to "come forward with appropriate evidence demonstrating that there [was] a pending dispute of material fact." *Waldridge*, 24 F.3d at 921; *see also Vector-Springfield Properties, Ltd. v. Central Illinois Light Co., Inc.*, 108 F.3d 806, 809 (7th Cir. 1997). To meet this burden, Crystal had to counter the affidavits and documents submitted by Frontier with materials of "evidentiary quality" (*e.g.*, depositions or affidavits) that created a factual issue. *Adler v. Glickman*, 87 F.3d 956, 959 (7th Cir. 1996). While the evidence offered need not be in a form that would be admissible at trial, *see Liu v. T&H Mach., Inc.*, 191 F.3d 790, 796 (7th Cir. 1999), the evidence must identify a specific, genuine issue for trial. *See Shermer*, 171 F.3d at 477.

Crystal has failed to file a response to plaintiff's motion for summary judgment, or to show that a genuine dispute of material fact exists.[1] As a result, this Court may properly deem the adverse party to have admitted the properly-supported facts presented by the movant. *See* UNITED STATES DIST. COURT, N. DIST. OF ILL. LR 56.1(b); *Garrison v. Burke*, 165 F.3d 565, 567 (7th Cir. 1999) (citing *Flaherty*, 31 F.3d at 453); *Adler*, 87 F.3d at 959. Here, Frontier's fact statement is supported by the evidence Frontier submitted; the undisputed material facts are set forth below.

[1]Crystal initially appeared in this case through counsel. However, in November 1999, Crystal's attorney was given leave to withdraw [doc. #40-1]. Crystal has elected not to retain substitute counsel. However, the Court gave Crystal notice of the briefing schedule on summary judgment, and thus Crystal had an opportunity to respond if Crystal saw fit to do so. It did not respond.

II.

Frontier is a Michigan corporation with its principal place of business in Michigan; Crystal is an Illinois corporation with its principal place of business in Illinois (Pl. Fact ¶¶ 1-2). On August 11, 1997, Crystal entered into a contract with Frontier for a one-year Optional International Clear Value Monthly Usage service, with a minimum usage level of $20,000 per month (the "Agreement") (Pl. Fact ¶ 4). The Agreement was entered into on Crystal's behalf by Richard Pierce, an owner of Crystal authorized by Crystal to do so (Pl. Fact ¶ 5). Under the terms of the Agreement, Frontier agreed to provide network transport and other telecommunications services to Crystal for Crystal's resale to business and residential customers, and Crystal agreed to pay Frontier for those services (Pl. Fact ¶6).

Frontier provided network transport and other telecommunications services to Crystal beginning in September 1997 and ending in May 1998 (Pl. Fact ¶ 7). Crystal paid for some of those services (Pl. Fact ¶ 8), with the last payment being a partial payment of an invoice on or about March 3, 1998 (Pl. Fact ¶ 11). By an invoice dated July 31, 1998, Frontier invoiced Crystal in the amount of $122,613.26 (Pl. Fact ¶ 9). The invoice listed the outstanding aggregate balance owed by Crystal to Frontier, based on thousands of calls chargeable to Crystal over approximately nine months of service (Pl. Fact ¶9). The charges and credits are accurate as set forth in the invoices sent by Frontier to Crystal between September 1997 and July 1998 (Pl. Fact ¶ 10).[2]

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[2]When asked in discovery to state whether it disputed the accuracy of the invoices, Crystal stated on September 16, 1999 that it was "unable to ascertain whether the information" was accurate (*see* Pl's. Compendium of Supporting Documents, Tab 4.D). At no time thereafter did Crystal offer anything in discovery to dispute the accuracy of the invoices.

Moreover, on October 19, 1999, then-Magistrate Judge Guzman, who was presiding in the case, granted the renewed motion by plaintiff Frontier to compel defendant, Crystal, to produce certain discovery. On January 6, 2000, based on Crystal's failure to comply with the discovery request, this Court barred Crystal from offering the following

Frontier fully performed it obligations under the Agreement, but Crystal failed to fully perform under the Agreement by failing to timely pay Frontier $122,613.26 for network transport and other telecommunications services provided to Crystal by Frontier (Pl. Fact ¶¶ 7, 9, 11). Crystal's Agreement with Frontier also provides that a monthly late payment fee of 1.5 percent may be assessed against Crystal for amounts unpaid commencing 30 days after the invoice date (Pl. Fact ¶ 12). In October 1999, as part of its settlement with Frontier, Equinox made a payment of $22,613.26, which Frontier concedes is properly applied to reduce the $122,613.26 claimed here (Pl.'s Reply at 2). Applying the late fee to the unpaid balances of the invoice from July 1998 through March 2000, and crediting Crystal with the $22,613.26 payment by Equinox, results in a total amount due and owing from Crystal to Frontier of $137,066.

III.

Jurisdiction for this matter is proper under 28 U.S.C. § 1332(a)(1) because there is diversity of citizenship between Frontier and Crystal, and the amount in controversy exceeds $75,000 exclusive of interest and costs. Venue is appropriate in this judicial district under 28 U.S.C. § 1391(a) since all the defendants are located in the Northern District of Illinois and a substantial part of the events giving rise to the claim occurred here.

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categories of evidence: (1) documents generated by Equinox/Crystal bookkeeper Dan Sommers concerning Frontier's telecommunications service and bills to Crystal; (2) Crystal's account payable ledgers pertaining to Frontier; and (3)1997 and 1998 Crystal financial statements, accountant's review and related workpapers, especially concerning accounts payable, prepared by Crystal's outside accountants. The Court also ruled that an adverse inference would attach to Crystal's failure to produce these documents, which is not necessary to -- but which further supports -- the absence of any genuine dispute on the material facts here.

In a diversity case, the Court applies federal procedural law and state substantive law. *See Dawn Equip. Co. v. Micro-Trak Sys., Inc.*, 186 F.3d 981, 986-87 (7th Cir. 1999) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). Under Illinois law, in order to properly show a breach of contact, a plaintiff must prove the essential elements which are: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4) resultant injury to the plaintiff. *See Gallagher Corp. v. Russ*, 721 N.E.2d 605, 611 (Ill. App. Ct. 1st Dist. 1999); *Elson v. State Farm Fire & Cas. Co.*, 691 N.E.2d 807, 811 (Ill. App. Ct.1st Dist. 1998).

In this case, Frontier has shown the existence of a valid and enforceable contract in the signed Dedicated Service Order No. 4510 which provides for a one-year Optional International Clear Value Monthly Usage service contract. In determining whether a valid agreement arose between the parties, Illinois law considers the question of the parties' intent to form a contract as a factual question, *see Wagner Excello Foods, Inc. v. Fearn Int'l, Inc.*, 601 N.E.2d 956, 961 (Ill. App. Ct. 1st Dist.1992), but "[o]nce the plaintiff produces evidence establishing a prima facie case that a contract exists, Illinois law shifts the burden of production to the defendant to offer any evidence to the contrary." *Roberts & Schaefer Co. v. Merit Contracting, Inc.*, 99 F.3d 248, 253 (7th Cir.1996) (citing *Ambrose v. Thornton Township Sch. Trustees*, 654 N.E.2d 545, 550 (Ill. App. Ct. 1st Dist.1995)). Given that Crystal has offered nothing to dispute the facts Frontier has produced, Frontier has proven the existence of a valid and enforceable contract.

Plaintiff has also shown the other elements of a claim for breach. Frontier has established that it fully performed its obligation under the contract by providing Crystal with network transport and other telecommunication services, and that Crystal failed to perform its obligation of payment for these services.

The resultant injury to Frontier is the unpaid bill, plus late charges, for services provided by Frontier for which Crystal did not pay.

While Crystal's answer denied the existence of a contract, Crystal has offered no proof to back up this denial. That is not enough to keep the case alive -- a bald and unsupported denial is insufficient to defeat a summary judgment motion. *Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 887 (7th Cir.1998). Here, Crystal has offered nothing at all, much less any evidence sufficient to warrant a trial of this matter.

CONCLUSION

For the foregoing reasons, Frontier's motion for summary judgment [doc. #45-1] is granted. The Court therefore enters judgment in favor of Frontier and against Crystal in the amount of $137,066.

ENTER:

SIDNEY I. SCHENKIER
United States Magistrate Judge

Dated: April 24, 2000